

From: [Kupchan, Simma](#)
To: [Kelly, Stephanie](#)
Subject: FW: 404 ASSUMPTION
Date: Thursday, January 30, 2020 1:54:17 PM
Attachments: [FDEP White Paper - ESA Consultation with Assumption Approval .pdf](#)
[FDEP Summary Paper - ESA Consultation with Assumption Approval.pdf](#)

See attached white paper and summary.

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From: Leopold, Matt (OGC) <Leopold.Matt@epa.gov>
Sent: Wednesday, July 17, 2019 4:56 PM
To: Fotouhi, David <fotouhi.david@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>;
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Subject: FW: 404 ASSUMPTION

FYI, let's discuss on Thursday. Thanks

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From: Valenstein, Noah <Noah.Valenstein@dep.state.fl.us>
Sent: Wednesday, July 17, 2019 4:10 PM
To: Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Ross, David P <ross.davidp@epa.gov>
Cc: Walker, Mary <walker.mary@epa.gov>; Wolfe, Justin G. <Justin.G.Wolfe@dep.state.fl.us>;
Wildeman, Anna <wildeman.anna@epa.gov>
Subject: 404 ASSUMPTION

Dear Mr. Leopold and Mr. Ross:

The Florida Department of Environmental Protection greatly appreciates the tremendous efforts by the U.S. Environmental Protection Agency over the last two years to facilitate state assumption under Section 404 of the Clean Water Act. As you both know, Section 404 assumption can streamline permitting processes, reduce costs and duplication of effort by state and federal authorities, and better align the 404 program with other delegated programs. The Trump Administration should be applauded for striving – in the spirit of cooperative federalism and environmental protection – to make 404 assumption a reality for more states. For our part, FDEP is continuing to move forward with efforts to apply for and obtain 404 assumption, which we hope to complete at the earliest possible opportunity. We are especially appreciative of the Administration's

recent efforts to clarify the “assumable waters” issue. Looking ahead, FDEP remains committed to working closely with EPA, the U.S. Army Corps of Engineers, and other stakeholders on the state and federal rulemaking processes necessary to make 404 assumption a reality in Florida.

Though substantial progress in our state 404 application process has occurred, a significant barrier to effective Section 404 assumption remains. Specifically, where the Corps administers the 404 program, Section 7 of the Endangered Species Act embodies a streamlined and efficient process to ensure protection of endangered species, which may not be available when a state administers the 404 program. It is our understanding that other states have grappled with this ESA-based barrier to 404 assumption. With this concern in mind, FDEP recently retained outside counsel at Latham & Watkins and Baker Botts LLP to help FDEP evaluate the range of options under existing law for addressing and potentially resolving this concern. Based on that review, and as outlined in the enclosed white paper and summary paper, FDEP believes that EPA can and should engage in a one-time ESA Section 7 programmatic consultation with the Services in connection with the *initial review* of a state’s 404 assumption application. This approach, which would bring state 404 permits within Section 7’s exemption from take liability, is both lawful and good policy. Because of the unique statutory text and legislative history found in Section 404, as outlined in our white paper, this approach will not implicate any other EPA authority.

Obtaining 404 assumption for the State of Florida is one of my highest priorities for FDEP at this time. To that end, I would respectfully request an opportunity to meet with you both in person in Washington DC at your next earliest availability. I have asked Justin Wolfe, FDEP’s General Counsel, to help arrange that meeting.

Thank you for your time and attention to this matter, and for your service to our nation at EPA.

Sincerely,

Noah Valenstein
Secretary, Florida DEP





EPA’S AUTHORITY TO RESOLVE THE “INCIDENTAL TAKE” BARRIER TO STATE 404 ASSUMPTION

The Administration should be applauded for striving to make Section 404 assumption a reality for more states. A significant remaining barrier to 404 assumption, which EPA can and should resolve, arises from the “incidental take” provisions of the Endangered Species Act (ESA). Unique among EPA delegation statutes, Clean Water Act (CWA) Section 404 gives EPA discretion to consider the protection of listed species – and hence, engage in ESA Section 7 consultation – when initially deciding whether to approve state assumption. Consultation here allows for take coverage for state permittees and greatly improves the utility of 404 assumptions especially in states with many listed species. This approach is supported by statutory text, legislative history, and policy, and will not adversely impact EPA obligations under other delegation statutes.

Why is “incidental take” coverage a serious obstacle to 404 assumption?

Where the U.S. Army Corps of Engineers administers the 404 program, a streamlined process under ESA Section 7 allows for incidental take of listed species. However, thus far, where a state administers the 404 program, permittees must avoid entirely adverse impacts to listed species or otherwise seek an Incidental Take Permit from the USFWS and/or NMFS (“Services”) under ESA Section 10. This Section 10 process, with the requirement to prepare a Habitat Conservation Plan, can take years to complete and usually at much higher cost.

Why is this especially critical to Florida’s plans for 404 assumption?

This ESA-concern is a serious hurdle to establishing an effective and efficient 404 program in Florida, where 135 ESA-listed species occur (the third most of any state). It is estimated that approximately ten percent of 404 permits issued in Florida require some form of incidental take coverage. This includes many large real estate, mining, agriculture, and utility industry projects with significant economic benefits to Florida and its citizens. Thus, unless a solution is found for this issue, large-scale projects in Florida will almost always require extensive federal permitting under the ESA notwithstanding 404 assumption. Other states have also begun to raise this ESA-related hurdle to assumption.¹

What is the best solution for addressing the “incidental take” obstacle to 404 assumption?

EPA should engage in a *one-time* ESA Section 7 programmatic consultation with the Services in connection with the *initial* review of a state’s 404 assumption application. This would allow the Services to issue a programmatic Biological Opinion (“BiOp”) and a programmatic incidental take statement (“ITS”). The BiOp with ITS would identify procedural requirements for state 404 permits. These would support the Services’ determination that assumption would not result in jeopardy to any listed species and would bring that state’s 404 permits within Section 7’s exemption from take liability. This streamlined permitting process would reduce costs and duplication of effort by state and federal authorities.

As a general legal matter, when is ESA Section 7 triggered?

ESA consultation is triggered when an “agency has discretion in administering the [statute] to consider the protection of endangered or threatened species as an end.”² EPA lacks this discretion when approving state delegations under CWA Section 402.³ No court has ruled if 404 assumption triggers consultation.

¹ See Letter from Western Governors Association to David Ross, et al. (Oct. 10, 2018) (“[ESA] was identified as an area of potential complication in states’ assumption of Section 404 permitting authority...”).

² *Florida Key Dey v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008) (interpreting 16 U.S.C. 1536(a)(2)).

³ *NAHB v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007) (“Nothing in [402(b)] authorizes the EPA to consider the protection of [listed] species as an end in itself when evaluating a [402] transfer application”).

Does the statutory text support ESA consultation when initially approving state 404 assumption?

Yes. Unlike Section 402, the text of Section 404 gives EPA discretion to consider protection of listed species. In fact, Section 404(h)(1) requires EPA, in deciding whether to approve state assumption, to determine whether the state has authority “[t]o issue permits which . . . assure compliance with . . . the [Section 404(b)(1)] guidelines...” In turn, the Section 404(b)(1) guidelines expressly prohibit state permits that “jeopardize the continued existence” of listed species or are likely to result in “the destruction or adverse modification of [critical] habitat.” 40 C.F.R. § 230.10(b)(3). And, under Section 404(g)-(h), EPA must share assumption applications with USFWS and “tak[e] into account” any USFWS comments.

Is this view consistent with the legislative history of Section 404?

Yes. In particular, the Senate Report accompanying the 1977 Amendments shows that the drafters understood these provisions to “preserve[] the Administrator’s *discretion* in addressing the concerns of [USFWS], yet affords them reasonable and early participation which can both strengthen the State program and avoid delays in implementation...” S. Rep. 95-370, at 78 (1977) (emphasis added).

Did EPA originally agree that approval of state 404 assumption triggered Section 7?

Yes. EPA engaged in Section 7 consultation for New Jersey’s assumption of the 404 program. After informal consultation and based on an agreement between EPA, the USFWS, and New Jersey, USFWS concurred that New Jersey’s assumption of the 404 program was not likely to adversely affect federally-listed species (and thus, USFWS did not issue a programmatic BiOp or ITS).

Was the “Silva Letter” – issued by the Obama Administration in 2010 – correct?

No. The brief letter signed by former Associate Administrator Silva in December 2010 resulted from a rushed review, ignored the actual text and legislative history of Section 404, and misapplied Supreme Court precedent. The Silva Letter had the effect – whether intended or not – of creating another serious hurdle to 404 assumption especially in states with many listed species.

How would consultation work in actual practice?

EPA would conduct a *programmatic* consultation with the Services as to its threshold decision whether to approve assumption. The Services’ regulations—including the existing rules and recently proposed changes—allow for programmatic consultation in these contexts. In response, the Services could issue a BiOp addressing whether assumption would jeopardize listed species, along with an ITS covering future state 404 permits. To help facilitate the process, the state agency could submit a Biological Assessment. 50 C.F.R. § 402.08. Moreover, EPA and any state may agree to extend the timeframe for 404 assumption review, which can be used to accommodate Section 7 consultation. *See* 50 C.F.R. § 402.14(e). A recent example – EPA’s Cooling Water Intake Structure Rule – shows how programmatic consultation (leading to a BiOp with ITS) has been used in a context with similar dynamics.

How long would it take EPA to complete consultation on a state assumption application?

With active support by the state and EPA, programmatic consultation and final approval of 404 assumption could be completed in less than a year.

Will this approach adversely impact other EPA statutory authorities involving state delegations?

No. Unlike Section 404, the approval criteria in the following state delegation/primacy statutes do not give EPA discretion to consider impacts to listed species at the time of approval: CAA Sections 111 and 112, SDWA Sections 1413 (PWS state primacy) and 1425 (UIC state primacy), RCRA Section 3006(b), and FIFRA Section 26. Nor do these statutes require EPA to engage with the Services.

**The enclosed white paper provides a more comprehensive legal analysis concerning EPA’s authority to undertake this approach.*